Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	)	WC Docket No. 02-112
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2002 **Released:** December 23, 2002

By the Commission: Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing a joint statement; Commissioner Martin concurring and issuing a statement.

I. INTRODUCTION

1. We initiated this rulemaking last May to consider the statutory sunset of the provisions of section 272 of the Telecommunications Act of 1996[1] that apply to Bell Operating Company (BOC) provision of in-region, interLATA telecommunications services.[2] In particular, we sought comment on whether the separate affiliate and related safeguards of section 272 should sunset as provided in the statute or be extended by the Commission. We also sought comment on a range of possible alternative safeguards for BOC provision of in-region, interLATA services after sunset of the 272 structural and related requirements.[3] We continue to review the broader issues in this proceeding as well as related issues concerning incumbent independent LEC provision of in-region, interexchange service before the Commission in a separate proceeding.[4] Moreover, we plan to issue a Notice of Proposed Rulemaking in the coming months to seek comment on whether there is a continued need for dominant carrier

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[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act, or the Act. *See* 47 U.S.C. § 151 *et. seq*. We refer to the Telecommunications Act of 1996 as the 1996 Act. *See* Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Notice of Proposed Rulemaking, 17 FCC Rcd 9916 (2002) (*Section 272 NPRM*).

[3] *Section 272 NPRM*, 17 FCC Rcd at 9922-25.

[4] *2000 Biennial Regulatory Review Separate Affiliate Requirement of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Notice of Proposed Rulemaking, 16 FCC Rcd. 17270 (2001).

regulation of BOC in-region, interLATA, domestic, interexchange telecommunications services provided outside of a section 272 separate affiliate.[5] We will take further action to address these issues in the future as appropriate. We also emphasize that while the Act clearly contemplates sunset of the separate affiliate and certain other requirements in section 272 if the Commission does not extend them by rule or order, we are firmly committed to ensuring compliance with the nondiscrimination requirements in section 272(e) that remain in effect.[6] In particular, we note that the Commission may order an independent audit or otherwise investigate compliance with these requirements.[7]

2. As announced in a Public Notice released today, certain provisions of section 272 sunset for Verizon in New York State by operation of law on December 23, 2002.[8] In this Order, we address certain issues concerning the scope of the section 272(f)(1) sunset provisions raised by parties to this proceeding. We interpret section 272(f)(1) of the Act as providing for a state-by-state sunset of the separate affiliate and certain other requirements that apply to BOC provision of in-region, interLATA telecommunications services. In reaching this determination,

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[5] In the *LEC Classification Order*, the Commission found the BOCs to be nondominant in the provision of in-region, interLATA, domestic, interstate service only insofar as that service is provided through a section 272 separate affiliate. *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket Nos. 96-149 & 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15761 & n.12 (1997), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771, 10798 (1999). *See also Competitive Carrier,* CC Docket No. 79-252*, Fifth Report and Order*, 98 FCC 2d 1191, n.23 (1984).

[6] Section 272(e)(1) provides that a BOC or an affiliate that is subject to section 251(c) "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service to itself or to its affiliates . . . ." 47 U.S.C. § 272(e)(1) (1996). Section 272(e)(2) provides that a BOC or an affiliate that is subject to section 251(c) "shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions . . . ." 47 U.S.C. § 272(e)(2) (1996). Section 272(e)(3) provides that a BOC or an affiliate that is subject to section 251(c) "shall charge the [section 272] affiliate described in subsection (a), or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service . . . ." 47 U.S.C. § 272(e)(3) (1996). Section 272(e)(4) provides that a BOC or an affiliate that is subject to section 251(c) "may provide any interLATA or intraLALTA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated." 47 U.S.C. § 272(e)(4) (1996).

[7] 47 U.S.C. §§ 154(i), 201-205, 218-220 & 403. We also note that the BOCs remain obligated to cooperate fully in the completion of the section 272(d) audits addressing section 272 compliance for all time periods prior to the statutory sunset even though these independent audits may be completed after the sunset date.

[8] Public Notice, *Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1)*, FCC 02-335 (rel. Dec. 23, 2002). Consistent with the precedent referenced in footnote 5 above, Verizon will be deemed nondominant in the provision of in-region, interLATA, domestic, interstate service only insofar as that service is provided through an affiliate that complies with section 272 and our implementing rules.

we first conclude that the meaning of section 272(f)(1) concerning the scope of the sunset is ambiguous. We then find that this section is best interpreted as providing for a state-by-state sunset because this approach is consistent with the state-by-state in-region, interLATA authorization provisions in section 271 and the general structure of the Act. Accordingly, we reject arguments advanced in this proceeding that section 272(f)(1) is unambiguous and must be read to provide for a region-wide or BOC-by-BOC sunset of the section 272 separate affiliate and related requirements.

II. BACKGROUND

3. *Statutory Provisions*. The section 272(f)(1) sunset language that we address in this Order is part of the Act's provisions for allowing the BOCs to enter the in-region, interLATA long distance telecommunications market once they have opened their local exchange markets to competition. Prior to entering the in-region, interLATA market in a particular state, a BOC must demonstrate compliance with the requirements of section 271 in that state, and obtain Commission authorization to provide such services.[9] Among other things, section 271 requires that a BOC applying for in-region, interLATA entry demonstrate that it will provide the authorized interLATA service in compliance with the requirements of section 272.[10] Section 272(a), among other things, provides that a BOC may not provide originating in-region, interLATA telecommunications services, subject to certain limited exceptions,[11] unless it provides that service through one or more affiliates that are separate from the incumbent BOC.[12]

4. The provisions of section 272 sunset as provided in section 272(f)(1), which states:

> The provisions of this section (other than subsection (e)) shall cease to apply with respect to . . . the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order.[13]

5. *Commission Proceeding*. In the Notice of Proposed Rulemaking (Notice) in this proceeding, the Commission described the sunset provisions of section 272(f)(1) as providing for

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9 47 U.S.C. § 271(b)(1).

10 47 U.S.C. § 271(d)(3)(B) (1996).

11 *See* section 272(a)(2)(B) for a description of the interLATA services that must be provided through a separate affiliate. 47 U.S.C. § 272(a)(2)(B) (1996).

12 47 U.S.C. § 272(a) (1996).

13 47 U.S.C. § 272(f)(1) (1996).

sunset of the separate affiliate and related section 272 safeguards on a state-by-state basis three years after section 271 authority is granted in a given state.[14] In their comments in response to this Notice, Verizon, SBC, BellSouth and USTA argue that the language of section 272(f)(1) is unambiguous on its face¸ and requires another result. Verizon, BellSouth[15] and USTA argue that the safeguards of section 272 sunset on a region-wide basis three years after a BOC or an affiliate of that BOC (including affiliated BOCs[16] as well as affiliated interexchange providers) obtains its first section 271 authorization.[17] SBC takes a somewhat different approach, arguing that section 272(f)(1) unambiguously provides for a BOC-by-BOC sunset three years after the BOC or an affiliate (not including affiliated BOCs) receives section 271 authority for the first state served by that BOC.[18] Under the SBC approach, however, the sunset would apply only to other states served by the individual BOC for whom the three year period has run in its first state to receive section 271 authorization. The sunset would not extend to states served by other BOCs that are affiliated with the BOC for whom the three year period has run in its first state. AT&T Corporation (AT&T), WorldCom Inc. (WorldCom), Sprint Corporation (Sprint), the National Association of State Utility Consumer Advocates (NASUCA), and the New Jersey Division of the Ratepayer Advocate (New Jersey Ratepayer Advocate) oppose the readings of section 272(f)(1) advocated by Verizon, SBC, BellSouth and USTA.[19]

III. DISCUSSION

6. *Overview*. In this Order, we apply to section 272(f)(1) a two step process for statutory analysis. First, we find that the meaning of section 272(f)(1) is not clear and unambiguous. Then, after a careful review of other closely related provisions of the Act, its underlying purposes, and its legislative history, we conclude that section 272(f)(1) is most reasonably interpreted as providing for a state-by-state sunset of the section 272 separate affiliate and related requirements.[20] We therefore reject the contentions advanced by Verizon, BellSouth and USTA that section 272(f)(1) unambiguously provides for a region-wide sunset of the

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14 *Section 272 NPRM*, 17 FCC Rcd 9916 at 9917.

15 We treat BellSouth as supporting a region-wide sunset, although its comments are not entirely clear on this point. This is probably due to the fact that the BellSouth region contains only one BOC, making the distinction between a region-wide and a BOC-by-BOC sunset immaterial in its case. *See* para. 10 *infra*. Our treatment of BellSouth as supporting the somewhat broader region-wide sunset approach has no bearing on our decision in this Order.

16 In a number of cases, more than one BOC provides service within a given Bell region. This is reflected in the definition of a "Bell operating company" contained in section 153(4) of the 1996 Act. 47 U.S.C. § 153(4) (1996).

17 Verizon Comments at 3-5; BellSouth Comments at 5-9; USTA Comments at 4-7; BellSouth Reply at 3-5; USTA Reply at 4, n.10.

18 SBC specifically criticizes the regional sunset approach as "overly broad." SBC Comments at n. 49.

19 AT&T Reply at 13-17; WorldCom Reply at 1-3; Sprint Reply at 2 & 9-10; NASUCA Reply at 4-5; New Jersey Ratepayer Advocate Reply at 2-4.

20 *See generally*, *Bell Atlantic v. FCC*, 131 F.3d 1044 (1997).

separate affiliate and related requirements three years after the first BOC or an affiliate, including another affiliated BOC, receives its first section 271 authorization. For the same reasons, we cannot accept SBC's narrower argument that this language unambiguously requires a BOC-by-BOC sunset three years after an individual BOC or its affiliated interexchange carrier receives its first section 271 authorization.

7. <u>*Section 271(f)(1) is Ambiguous*</u>. Section 272(f)(1) cannot properly be viewed as unambiguous so as to foreclose the interpretation we adopt here. The language in section 272(f)(1) at issue states that the provisions of section 272 (except for section 272(e)) will sunset for "*the interLATA telecommunications services of a Bell operating company* 3 years after the date *such Bell operating company or any Bell operating company affiliate* is authorized to provide interLATA telecommunications services under section 271(d) . . . ."[21] Considered entirely in isolation, this reference to "any Bell operating company affiliate" could be read to include affiliates that are also BOCs as advocated by Verizon, BellSouth and USTA, thus producing a region-wide sunset.[22] The statement that certain provisions of section 272 will "cease to apply to the . . . interLATA telecommunications services *of a Bell operating company*" could also be read in isolation to provide for a BOC-by-BOC sunset as advocated by SBC. The fact that parties with similar interests in this proceeding advance different readings of section 272(f)(1) itself indicates that the language is ambiguous. More importantly, both of these readings of section 272(f)(1) produce anomalous results when considered in conjunction with the requirements of section 271, which are specifically referenced in section 272(f)(1). As the United States Court of Appeals for the District of Columbia Circuit stated in reviewing a Commission decision concerning the plain meaning of language in section 275 of the Act, "[w]hen the purported 'plain meaning' of a statute's word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity."[23]

8. The anomalous results produced by both of these interpretations of section 272(f)(1) flow from the interaction of the sunset provisions and the requirements of section 271. Section 271(d)(3)(B) specifically requires that an applicant for in-region, interLATA authority demonstrate that the requested authorization "will be carried out in accordance with the requirements of section 272."[24] Section 271 contains no indication that there are exceptions to this requirement. Both of the purported "plain language" readings of section 272(f)(1), however, would effectively read this requirement out of section 271 to a large extent. Under the region-wide sunset approach, this section 271 requirement would effectively be eliminated three years

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21 47 U.S.C. § 272(f)(1) (1996) (emphasis added).

22 In fact, the definition of a "Bell operating company" contained in the Act recognizes that BOCs are typically affiliated with one another within larger corporate families. The Act defines a "Bell operating company" in section 153 by listing the individual BOCs in subpart (A). In subpart (B), the definition specifically excludes affiliates that are not also listed as BOCs in subpart (A) unless they are a successor or assign of the BOC that provides wireline telephone exchange service as described in subpart (B). 47 U.S C. § 153(4) (1996).

23 *Alarm Industry Communications v. FCC*, 131 F.3d 1066 at 1068 (1997).

24 47 U.S.C. § 272(f)(1) (1996) (emphasis added).

after a BOC received section 271 authority for the first state in the region, regardless of whether it had obtained section 271 authority in all of its other in-region states. Yet, the language of section 271 on its face requires a BOC to show that "the requested [in-region, interLATA] authorization will be carried out in accordance with the requirements of section 272."[25] We are not persuaded that the cross-reference in section 271(d)(3)(B) to "the requirements of section 272" unambiguously refers merely to the nondiscrimination requirements in section 272(e) that exist post sunset. Nor is it unambiguous that this cross-reference reference refers to the statutory sunset provision. There is nothing else in the language of section 271 indicating that either of the approaches advocated by the BOCs or USTA was intended. Instead, the language in section 271 with its reference to "requirements" appears to focus on mandating that the applicant will operate pursuant to the separate affiliate safeguards rather than on incorporating the sunset provisions. Regardless of how this cross-reference should be interpreted, it does not render section 272(f)(1) unambiguously clear on its face.

9. Consideration of how the region-wide and BOC-by-BOC sunsets would work in practice serves to illustrate these anomalous results. Under the region-wide sunset approach, three years after Verizon's section 271 authorization in New York, which occurred on December 22, 1999, the section 272 separate affiliate and certain other safeguards would sunset for the entire Verizon region, including states for which Verizon has not yet filed section 271 applications, thus effectively rendering section 271(d)(3)(B) a nullity for those states. Application of a region-wide sunset could produce equally anomalous results if applied to SBC's Texas authorization since the section 272 separate affiliate and related requirements would sunset for all of the states in the former Ameritech region on July 1, 2003, even if no section 271 applications have yet been filed for these states. The BOC-by-BOC approach could potentially have produced similarly anomalous results depending on how many states were included in a given BOC's service area, and when the BOC received section 271 authorization in those states.

10. In addition, the BOC-by-BOC and region-wide interpretations of the section 272 sunset appear to produce arbitrary results when applied in conjunction with the definition of a BOC contained in the Act. In particular, under this reading, the scope of the sunset turns on matters of corporate structure, which are subject to control by the BOCs. Section 153(4) of the Act lists all of the companies that are to be considered BOCs. Many of the companies listed appear to include primarily or exclusively operations located in a single state.[26] Other companies listed as BOCs in the definition include operations in multiple states.[27] Under the BOC-by-BOC

25 47 U.S.C. § 271(d)(3)(B) (1996).

26 Examples of this include: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, New Jersey Bell Telephone Company, New York Telephone Company (which also includes very limited operations in Connecticut), The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Co., The Ohio Bell Telephone Co., The Pacific Telephone and Telegraph Co., and Wisconsin Telephone Company. 47 U.S.C. § 153(4) (1996).

27 Examples of this include: New England Telephone and Telegraph Co., U S West Communications Co., South Central Bell Telephone Co., Southern Bell Telephone and Telegraph Co., and Southwestern Bell Telephone Co.

approach, the scope of the sunset would turn on the number of states included within a single BOC. Moreover, under the BOC-by-BOC and the region-wide theories, the sunset mechanism could function differently as the result of changes in corporate structure. For example, in the case of a region with multiple BOCs, the individual companies could be combined to bring more states under a single BOC umbrella.[28] In addition, a number of Bell regions have changed since passage of the Act as the result of mergers and acquisitions.[29] Having operation of the section 272(f)(1) sunset provisions depend on such factors appears entirely arbitrary.

11. In contrast, the language of section 272(f)(1) can be read as requiring a state-by-state sunset, thus avoiding anomalous results under section 271. For example, the reference to "any" affiliate in section 272(f)(1) (which Verizon, BellSouth and USTA cite as requiring a region-wide sunset) can be read as ensuring that a section 271 authorization received by a BOC interexchange affiliate would trigger the start of the three year period leading up to sunset.[30] This reference to affiliates is necessary because the definition of a "Bell operating company" in the 1996 Act specifically excludes any affiliate of a BOC, such as a section 272 affiliate, that does not independently qualify as a BOC or a successor or assign of a BOC.[31] In fact, SBC supports viewing the language, "any Bell operating affiliate," as referring to any section 272 affiliate.[32] The language in section 272(f)(1) stating that section 272 (except for section 272(e)) will cease to apply to the "interLATA telecommunications services of a Bell operating company" also is meaningful if read in a less expansive manner. In particular, this language can be viewed as referring to the BOC's interLATA telecommunications services covered by the authorization that has reached the three year anniversary date. This approach gives independent meaning to the provision while paralleling the section 271 authorization process.

12. *Interpretation of Sunset Provisions*. We conclude that the most reasonable reading of section 272(f)(1) is that it provides for a state-by-state sunset, consistent with the provisions for the authorization of in-region, interLATA entry in section 271. This interpretation of the sunset provisions is also consistent with the provisions of section 271(d)(3)(B) requiring a showing that the in-region, interLATA authorization will be carried out in accordance with the requirements of section 272. In addition, it produces consistent results when applied in conjunction with the definition of a BOC contained in the Act. In contrast, as previously discussed, the interpretations urged by Verizon, SBC, BellSouth and USTA produce anomalous results under section 271 and the definition of a BOC contained in the Act. Nor do we find the

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28 For example, Southern Bell and South Central Bell have been consolidated as BellSouth.

29 In particular, SBC acquired Pacific Bell and Ameritech, while Bell Atlantic merged with NYNEX.

30 In particular, the term "any" need not be construed in an expansive fashion in all cases. *Bell Atlantic v. FCC*, 131 F.3d 1044, at 1047 (1997).

31 Section 153(4)(C) states that the term, BOC, "does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) [which lists the companies that qualify as BOCs] or (B) [which includes within the term, BOC, certain successors and assigns of the BOCs]. 47 U.S.C. § 153(4)(C) (1996).

32 SBC Comments at n.49.

legislative history and policy arguments cited by these parties to be persuasive.[33]

13. We find that section 272(f)(1) should be interpreted as providing for a state-by-state sunset of the section 272 separate affiliate and related requirements. A state-by-state sunset parallels the state-by-state authorization process provided for in section 271. Section 271(d)(1) specifically provides that a BOC or its affiliate "may apply to the Commission for authorization to provide interLATA services originating in any in-region State."[34] This subsection also states that "[t]he application shall identify each State for which authorization is sought."[35] In addition, section 271(d)(3), which establishes a 90-day deadline for Commission action on section 271 applications, provides that "the Commission shall issue a written determination approving or denying the authorization requested in the application for each State."[36] Moreover, under a state-by-state sunset approach, application of the section 272 separate affiliate and related requirements will also be consistent – applying to each state for a three year period after authorization, absent extension of the sunset for a particular state.

14. The state-by-state approach is also consistent with the requirements of section 271 and the definition of a BOC contained in the Act. The state-by-state sunset approach is entirely consistent with the provision in section 271(d)(3)(B) requiring that each application demonstrate that "the requested [in-region, interLATA] authorization will be carried out in accordance with section 272."[37] Under a state-by-state sunset, the separate affiliate and related safeguards of section 272 will apply in each state for three years after grant of a section 271 application. A requirement that each section 271 application show that in-region, interLATA entry will comply with the separate affiliate and related requirements of section 272 is entirely consistent with this. The state-by-state sunset approach also produces logical, consistent results under the definition of a BOC contained in section 3(4) of the Act. Although the companies listed as BOCs in the definition include operations in different numbers of states,[38] the sunset provisions would apply to in-region, interLATA telecommunications services in each state for the same period of time.

15. A state-by-state sunset also avoids the anomalous results under section 271(d)(3)(B) and the statutory definition of a BOC that are produced by application of a BOC-

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[33] The language in the *Non-Accounting Safeguards Order* cited by Verizon as a Commission interpretation of section 272(f)(1) consistent with their position is merely a paraphrase of the ambiguous statutory language, not an interpretation of that provision. *See* Verizon Comments at 4 (*citing Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 at para. 14 (1996)).

[34] 47 U.S.C. § 271(d)(1) (1996).

[35] *Id*.

[36] 47 U.S.C. § 271(d)(3) (1996).

[37] 47 U.S.C. § 271(d)(3)(B) (1996).

[38] *See* note 27 *supra*.

by-BOC or region-wide sunset.[39] As previously discussed, both the region-wide and the BOC-by-BOC approaches to the section 272 sunset could result in sunset of the section 272 separate affiliate and related safeguards in states for which a section 271 application has not even been filed. This result is in conflict with the requirement of section 271(d)(3)(B) that applicants demonstrate that in-region, interLATA entry will comply with the requirements of section 272. The region-wide and BOC-by-BOC sunset approaches also produce anomalous results under the statutory definition of a BOC, with the scope of the sunset turning on matters of corporate organization such as how many states are encompassed within the scope of a single BOC or region.

16. The legislative history cited by the BOCs and USTA does not persuade us that section 272(f)(1) should be interpreted as providing for a region-wide or BOC-by-BOC sunset of the separate affiliate and related requirements.[40] As these parties point out, the House Bill (H.R. 1555) specified that the structural safeguards would "cease to apply to any Bell operating company in any State 18 months after the date such Bell Operating Company is authorized . . . to provide interLATA telecommunications service in such State." [41] In contrast, the Senate Bill (S. 652) contained no sunset provision, but allowed the Commission to make exceptions to the requirements of section 272.[42] Rather than follow either of these approaches, the House–Senate Conference Committee adopted the current sunset language, stating that the three year period "would commence on the date on which the BOC is authorized to offer interLATA services."[43]

17. We find that this legislative history is inconclusive. In particular, it fails to convince us that Congress intended to create the anomalous results that flow from reading the Act as providing for a region-wide or BOC-by-BOC sunset discussed above. The Conference Report statement that the three-year period leading up to the sunset would begin when the BOC is authorized to offer interLATA services does not resolve the question of how the sunset was intended to work, particularly in light of the fact that the BOCs are authorized to enter the in-region, interLATA market on a state-by-state basis.[44] We recognize that the legislative history could be read as showing that the Conference Committee rejected the state-by-state approach clearly contemplated in the House Bill. But it is also entirely plausible that the Conference Committee was focused on the basic question of whether to have a sunset provision at all, and, if so, how much time should elapse before the sunset provisions became effective, rather than on

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39 *See* paras. 7-11 *supra*.

40 SBC Comments at 19-21; Verizon Comments at 5-6; BellSouth Comments at 6-9; USTA Comments at 4-5; SBC Reply at 6-7; USTA Reply Comments at 5.

41 H.R. Rep. No. 104-204, 104th Cong., 1st Sess., at 11 (1995).

42 S. Rep. No. 104-230, 104th Cong., 2nd Sess. at 24 (1995).

43 H.R. Conf. Rep. No. 104-458, 104th Cong., 2nd Sess. at 152 (1995).

44 While the legislative history concerning whether the Commission could grant exceptions to the separate affiliate requirement prior to authorizing provision of interLATA service can be viewed as supporting the position of the BOCs and USTA, it is in no way dispositive of congressional intent. *See* SBC Comments at 20, n.54.

the precise mechanics of how the sunset would work.

18. In addition, there is evidence in the legislative history that Congress intended the section 272 structural safeguards to apply to in-region, interLATA services in each state, rather than sunset in a manner that could avoid application of these requirements in certain states as would be the case with a region-wide or BOC-by-BOC sunset. In summarizing the Senate Bill, the Conference Report states that one of the requirements for Commission approval of a section 271 application is a showing "that the interLATA services will be provided through a separate subsidiary that meets the requirements of new section [272] . . . . "[45] In discussing the conference agreement, the Report goes on to state, "[i]n new section 271(d), the conference agreement adopts the basic structure of the Senate bill concerning authorization of BOC entry by the Commission, with a modification to permit the BOC to apply on a State-by-State basis."[46] There is no indication of an intent to permit in-region, interLATA entry without the use of structural and other safeguards for some minimum period of time, as could happen with a region-wide or BOC-by-BOC sunset.

19. Moreover, we are not persuaded to reach a different result by SBC's, Verizon's, and USTA's contention that a state-by-state sunset will deprive the BOCs of the full benefit of the sunset.[47] In particular, they argue that the BOCs cannot integrate their local exchange and in-region, interLATA operations on a state-by-state basis without incurring excessive administrative costs. We are not persuaded that these policy considerations provide adequate justification for reading the statute as these BOCs and USTA propose. While we strongly support the Act's deregulatory purposes, we cannot find that Congress intended a region-wide or BOC-by-BOC sunset in light of the considerations discussed above.[48]

IV. PROCEDURAL MATTERS

A. FINAL REGULATORY FLEXIBILITY CERTIFICATION

20. The Regulatory Flexibility Act of 1980, as amended (RFA),[49] requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic

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[45] S. Conf. Rep. No. 104-230, at 145 (1995).

[46] S. Conf. Rep. No. 104-230, at 149 (1995).

[47] SBC Comments at 19-23; Verizon Comments at 3-11; USTA Comments at 4-6.

[48] Given that we interpret section 272(f)(1) as providing for a state-by-state sunset, we need not address WorldCom's statutory interpretation argument that if the statute is read to provide for a BOC-by-BOC sunset, it must also be read as providing that the three year period begins when the BOC receives section 271 authority for its final state. WorldCom Reply 2-3. Nor do we address arguments seeking a similar result based on policy considerations. *See*, *e.g.*, Sprint Comments at 1, 3 & 5; Sprint Reply at 9-11.

[49] The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

impact on a substantial number of small entities."[50] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[51] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[52] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[53]

21. In the NPRM in this proceeding, the Commission certified that none of the proposals, if adopted, would have a significant economic impact on a substantial number of small entities because the issues under consideration in this proceeding directly affect only the BOCs and their affiliates, which do not qualify as small entities under the Regulatory Flexibility Act (RFA).[54] The NPRM stated that none of the BOCs is a small entity because each BOC is an affiliate of a Regional Holding Company (RHC) and all of the BOCs or their RHCs have more than 1,500 employees under the applicable SBA size standard.[55] The NPRM also stated that insofar as this proceeding applies to other BOC or RHC affiliates, those affiliates are controlled by the BOCs or by the RHC and thus are not "independently owned and operated" entities for purposes of the RFA.[56] Furthermore, comment was requested on this initial certification, and no party addressed this issue. Therefore we certify that the requirements of this Order will not have a significant economic impact on a substantial number of small entities.

22. The Commission will send a copy of this Order, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.[57] In addition, the Order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.[58]

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[50] 5 U.S.C. § 605(b).

[51] 5 U.S.C. § 601(6).

[52] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[53] 15 U.S.C. § 632.

[54] *Section 272 NPRM*, 19 FCC Rcd 9916 at 9927.

[55] *See* 13 C.F.R. § 121.201, NAICS Code 517110.

[56] *Id*.

[57] *See* 5. U.S.C. § 801(a)(1)(A).

[58] *See* 5 U.S.C. § 605(b).

(continued….)

B. FINAL PAPERWORK REDUCTION ACT ANALYSIS

23. This Opinion and Order does not contain information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will not be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i)-(j), 201-205, 218-220, 251, 271, 272, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154 (i)-(j), 201-205, 218-220, 251, 271, 272, 303(r) and 403, this Order IS ADOPTED.

25. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)

JOINT STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN AND COMMISSIONER MICHAEL J. COPPS, DISSENTING IN PART

Re: Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements

We dissent in part from today's decision insofar as it allows the separate affiliate requirements in Section 272 to sunset for Verizon in New York without the necessary analysis by the Commission. As the Commission stated so clearly just last week in its decision on the *SBC California 271 Order,* "our principal guarantee under the Act against improper accounting practices and cross-subsidizations is compliance with the structural and accounting safeguards of section 272." In this era of corporate governance problems and accounting depredations, we find it incredible that the Commission would eliminate a tool to provide safeguards and accounting transparency without even addressing the arguments raised in the record.

In Section 272, Congress required Bell companies to provide long-distance and manufacturing services through a separate affiliate. In implementing these requirements, the Commission concluded that Congress adopted these safeguards because it recognized that Bell companies may still exercise market power at the time they enter long-distance markets. Congress provided that these requirements would continue for three years, but could be extended by the Commission by rule or order.

Congress clearly gave the Commission the charge to determine whether these structural, accounting, and auditing safeguards remain necessary to prevent anticompetitive discrimination in the market. Yet the Commission has neglected to consider whether there is a need for these or alternative safeguards. The Commission has also not addressed other steps necessary to prevent discrimination, such as performance measures, notwithstanding that that issue has been pending for more than a year. Further, the Commission has failed even to address arguments raised in the record.

In particular, the Commission has not considered the views of our State colleagues. The New York Commission found that elimination of these requirements would be premature. The Texas Commission – the next State in the queue for elimination of these requirements – concluded that the sunset of the Section 272 safeguards would be "imprudent and untimely," and "would fail to meet Congress' objectives in implementing Section 272." Since the State commissions are engaged in the Section 271 process from the beginning, and are our partners in the effort to carry out the directives of Congress, it is particularly important to weigh their considerations, and particularly that of the affected State, as we move to this next phase.

Further, we have neglected to analyze the market in New York. Our data on whether competition is taking hold is sketchy and non-integrated. The data we have and the analysis derived from it are, for us, insufficient for making the determination mandated by Congress.

By neglecting to comprehensively evaluate the basis for our action in this proceeding, we now reach the anomalous result that rural independent carriers are subject to more stringent separation requirements than the Bell companies. We would have preferred to address all of these issues together in a coherent and reasoned manner.

Without doing so, we have not fulfilled our statutorily mandated responsibilities.

CONCURRING STATEMENT OF
COMMISSIONER KEVIN J . MARTIN

Re: Public Notice, Section 272 Sunsets For Verizon in New York State By Operation of Law on December 23, 2002 Pursuant To Section 272(f)(1)

In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket 02-112

Today, the Commission—in a public notice—declares that the statutory requirement that BOCs provide in-region, interLATA telecommunications services through a separate corporate affiliate will sunset for Verizon's operations in New York by operation of law.[1]

I am concerned that the Commission's decision to summarily allow the section 272 requirements to sunset was made through a public notice rather than a Commission order responding to questions raised on the record. The decision to allow the separate affiliate requirements to sunset without any analysis or discussion is odd given that the Commission previously released a notice asking whether we should extend the section 272 safeguards.

In response to our request for comment, many parties, including state commissions, contend that it is premature to lift the separate affiliate safeguards provided by section 272. For example, some contend that the sufficiency of the biennial audit process has yet to be established.

I would have preferred that we affirmatively set forth, in a separate Commission order, our analysis and justification for granting the relief we announce in today's public notice rather than remain silent.

[1] 47 USC Section 272.